of the bank. The second rule provided that such officer retiring with the consent of the directors should receive an allowance at the rate of one-third of the annual amount of his salary at the time he so retired. Under the fifth rule no retiring allowance whatever was to be granted to any officer who was dismissed from the service of the bank. In October 1899, the plaintiff endorsed a promissory note which was made by a Mr. Horace Sedger. This fact came to the knowledge of the defendants owing to the note being discounted at one of the branch banks of the London Joint Stock Bank, and thereupon the defendants called upon the plaintiff for an explanation. The plaintiff stated that he had been promised the sum of £25 by Mr. Horace Sedger for endorsing the note, and that he was unaware that Mr. Sedger was other than a person of sound financial position. On November 16, 1899, the plaintiff received a letter from the secretary to the bank in regard to the matter of the promissory note. The letter contained the words "you are required to resign your appointment to the bank," and on November 20 the plaintiff wrote to the secretary resigning his appointment.

The plaintiff then sought to obtain a declaration that he was entitled to a pension from the bank on retiring from his position as clerk. At the trial before Wright J. counsel for the plaintiff contended that his resignation in the circumstances was "with the consent of the directors" and that the plaintiff was not dismissed from his appointment, because requiring a person to resign was not the same as dismissing him. Wright J. found for the defendant bank. In giving judgment he said that the question to be decided was not an easy one. He felt that there was great force in counsel's contention that the plaintiff had not been dismissed. In official life it was open to employers to invite a man to retire, to require him to retire, or to dismiss him. He was doubtful if the facts of the present case amounted to dismissal. But the real question was whether or not the plaintiff had brought himself within the words "retiring with the consent of the directors". The words in the letter from the secretary were "you are required" and he thought it would be an abuse of language to say that a man who retired in that way, under compulsion, did it with the consent of the directors.

The plaintiff appealed. In the Court of Appeal, (20 T.L.R., 8) the Lord Chancellor, in giving judgment said, "Mr. Justice Wright had come to a perfectly correct decision. They had to look at the whole of the facts, and, doing so, there could be no doubt but that the plaintiff was dismissed. The use of polite instead of preemptory language did not alter the fact". The Lord Chief Justice and Lord Justice Cozens-Hardy concurred.

On the facts of the present case, I hold that the plaintiff was dismissed from his employment with the defendant Company. The next question is, was he given adequate notice? Counsel for the defendant Company concedes that in the circumstances of this case, having regard to the fact that the plaintiff was a professional engineer and was employed as manager of the defendant Company's Singapore office, three months' notice could be considered a reasonable notice for the purpose of terminating his services. Had the defendant Company given the plaintiff three months' notice on October 16, 1975, he would have become entitled to a bonus of one month's salary under the terms of his contract of service. In the result the plaintiff succeeds in his claim of $10,977 subject to the requisite C.P.F. deductions from the amount of the three months' salary and the bonus. There will be judgment for the plaintiff for the sum found due after the said deductions. The defendant Company will also pay the plaintiff the costs of this action as taxed on the High Court scale.

Claim allowed.

Solicitors: *Andrew Ee & Co.; Rodyk & Davidson.*

WONG WAI CHENG v. ATTORNEY-GENERAL OF SINGAPORE

[O.C.J. (Chua J.) September 1, 1978]

[Singapore — Originating Motion No. 26 of 1977]

Arbitration — Application to set aside award of arbitrator on ground that arbitrator had made errors of law on the face of the award — Contract — Fundamental breach — Exception clause — Admissibility of pre-contract negotiations and statements — Evidence Act (Cap. 4), s. 92.

Contract — Fundamental breach — Exception clause — Admissibility of pre-contract negotiations and statements to vary written contract — Evidence Act (Cap. 4), s. 92.

Evidence — Written contract — Admissibility of pre-contract negotiations and statements to vary written contract — Evidence Act (Cap. 4), s. 92.

The claimant had entered into a contract with the Government of Singapore for the carrying out of certain road works on certain lands. Parts of the land were covered by a Chinese cemetery, by squatters and by government bungalows. It was provided in the contract that possession of the site "as complete as may be reasonably possible" should be given to the claimant on or before February 1, 1971 and the claimant was to complete the works on or before January 31, 1973, subject nevertheless to the provisions for extension contained in the contract. There was a delay in giving the claimant possession of the site and on June 5, 1973 the applicant stated that he would cease work as the P.W.D. was in fundamental breach of the contract. The dispute between the parties was referred to arbitration. The arbitrator found that the claimant was entitled to damages in the sum of $517,925.08 and that the counterclaim of the government failed. The Attorney-General thereupon applied by motion for an order that the award of the arbitrator be set aside and the claimant be restrained from enforcing the award. Reference was made to the exception and protecting provision in Clause 32(b) of the contract.

Held: (1) the arbitrator was correct in implying a term in the contract that the claimant should be able to proceed with the contract works in a normal, commercial and forseeable manner. In this case in view of the delay in giving possession of the site to the claimant, there had been a fundamental or repudiatory breach;

(2) the arbitrator was correct in his view that the evidence of pre-contract negotiations and statements made by or on behalf of either party and not being within the contract documents was inadmissible under section 92 of the Evidence Act to contradict, vary, add to or subtract from the terms of the contract;

(3) the arbitrator was correct in stating that it is well established that a party who is in fundamental breach cannot rely on exceptions or protecting provisions in the contract;

(4) there was no substance in the complaints of the respondent and therefore the action to set aside the award must be dismissed.

Cases referred to:-

(1) *Suisse Atlantique Societe D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.

(2) *China National etc. Corp.* v. *Evlogia Shipping Co. S.A.* [1976] 3 All E.R. 865 at p. 874.

ORIGINATING MOTION.

H.E. Cashin for the claimant.

Warren Khoo Leang Huat (Senior State Counsel) for the Attorney-General.

Chua J.: This matter comes before me in the form of a Notice of Motion by the Attorney-General of Singapore (the Respondent) for an order that "the award dated February 23, 1977, made between the parties by Mr. A.P. Godwin (the Arbitrator) may be set aside, that the facts be directed to be stated in the form of a special case and that the claimant therein be restrained from enforcing the award in the same manner as a judgment or order to the same effect."

The short facts are these. By a contract in writing dated February 15, 1971, entered into between the Director of Public Works for and on behalf of the Government of the Republic of Singapore of the one part (the P.W.D.) and Wong Wai Cheng (m.w.) trading as Union Contractors (the claimant) of the other part the claimant agreed, in consideration of the sum of $3,919,788 to be paid to the claimant by the Government, to carry out the following works:—

(1) Overpass at Adam Road/Pan Island Expressway Interchange;

(2) Underpass at Kheam Hock Road/Pan Island Expressway Interchange;

(3) Pan Island Expressway from Adam Road to Whitley Road;

(4) Carriageway linking Whitley Road to Mount Pleasant Road.

The site for the said works was a strip of land running in a generally north-westerly direction from Whitley Road and thereafter across Mount Pleasant Road, Jalan Mendaki, Lorong Halwa, Kheam Hock Road and Adam Road to a point approximately 1,100 ft. beyond Adam Road.

At the time of the said contract certain parts of the site were occupied by graves of a Chinese cemetery, by squatters and by Government bungalows.

It is provided by clause 29(b) of the Conditions of Contract that "possession of the site as complete as may be reasonably possible" shall be given on or before February 1, 1971, to the claimant "who shall thereupon and forthwith commence the works and regularly proceed with and complete the same" on or before January 31, 1973, "subject nevertheless to the provisions for extension of time hereinafter contained."

Note 5 of the Specifications, which form part of the contract, provides that the claimant was to allow in the contract for any delay in her work that may occur due to the presence of squatters, exhumation of affected graves in two burial grounds, and land not yet acquired on the date for the possession of the site, and states that no claim or compensation of any kind shall be entertained with regard to such delays or inconvenience.

It is further provided by clause 32(b) of the Conditions of Contract that —

"If the Contractor shall be prevented from or be materially impeded or delayed in the execution or completion of the Work by reason or in consequence of any acts or omission of the Government or of the Superintending Officer contrary to the true intent and meaning of these presents such prevention, impediment or delay shall not vitiate the contract or affect the same except that in such cases the question whether any or what compensation or allowance ought to be paid or made to the Contractor in respect of such prevention, impediment or delays and in what manner such compensation or allowance ought to be paid or made shall be determined and settled by the Government whose decision shall be final."

The date for completion of the works under the contract was extended from January 31, 1973, to December 31, 1973, by agreement in writing between the parties in January, 1973.

At the end of May, 1973, the claimant ceased work under the contract and alleged by letter dated June 5, 1973, that the P.W.D. was in fundamental breach of the contract.

The P.W.D. by letter dated June 15, 1973, rejected the claimant's said contention and demanded that the claimant resume work within seven days of receipt thereof. The claimant by letter dated June 23, 1973, reasserted the contention that the P.W.D. was in fundamental breach of the contract and declined to resume work as directed.

The P.W.D. called for tenders from other contractors for the completion of the said works and subsequently awarded a fresh contract thereof.

The dispute was then referred to arbitration.

The arbitrator published his award on February, 23, 1977. The arbitrator found that the claimant was entitled to damages and that the counterclaim of the government failed. He awarded to the claimant the sum of $517,925.08 damages with interest at 8% from June 5, 1973, to date of payment and costs and expenses.

The respondent seeks to set aside the award on the ground that the arbitrator made errors of law on the face of the award.

The first point taken by the respondent is that the arbitrator was wrong in holding that the P.W.D. was in fundamental breach and that the claimant was entitled to rescind the contract.

The arbitrator's findings were as follows:—

"(5) The evidence showed that the site was not in fact handed to the claimant on the date for possession, namely, February 1, 1971. It was necessary for the P.W.D. to arrange for exhumation of a large number of graves and the disposal of the skeletons, for the diversion of services, including Army signals installations, for the acquisition of areas of land, and for the clearance of numerous squatters. In my opinion, the evidence of pre-contract negotiations and statements made by or on behalf of either party and not being within the contract documents is inadmissible under section 92 of the Evidence Act to contradict, vary, add to or subtract from the terms of the contract and I do not, therefore, propose to consider the arguments as to the contract advanced on behalf of the P.W.D. and falling within section 92.

(6) It is abundantly clear from pages 52 to 63 of the Notes of Evidence that both sides accept that on the date of possession and for the rest of 1971, the P.W.D. was proceeding with the clearance of graves and squatters, and the land acquisitions. The known graves were finally removed by early December 1971, and thereafter odd skeletons on graves were discovered as work proceeded. Difficulties were encountered, in particular in connection with the Seh Ong cemetery. The Seh Ong lands were eventually surrendered on May 26, 1971, and they comprised at least 6 of the 12 sections of the Site.

(7) With regard to the clearance of squatters, land acquisition was substantially completed by the end of May, 1971, after which the physical clearance of the people concerned began, ending in September 1973 (some 8 months after the original date for completion of the works).

(8) It is common ground that until the cemetery lands were acquired, only a very small part of the Site was available for the works. In addition to the above obstructions, there were 2 bungalows on section 2, one of which was wholly within the Site and the other touching the boundary of the overall road reserve at section 2.

(9) RW8, Robert Lim, Acting Senior Executive Engineer, Roads Branch, P.W.D., said that he would not expect a contractor to have started road building on this Site during 1971, and that it was impossible for any real road building work to have been done before the graves had been cleared in late November/early December 1971. He also said that if work were to be done, it would have to be done piecemeal, and that the first 11 months of the contract were in effect lost to the claimant. The same witness also said that at the end of 1972, 60–70% of the works could still not be done by the claimant, and there was little change by May 1973, at which time 50–60% of the works could not be done. The AB 2-203 and 204 show that the P.W.D. extended the contract period to December 31, 1973 by reason of the delays due to land acquisition, squatters, clearance and exhumation which were not the claimant's fault. The claimant signed a form to the effect that she agreed not to claim compensation or allowance for the delays in completion, if such extension were granted, as it was.

(10) The evidence of CW1, Peter Woo Shu Weng, the claimant's husband and Manager, shows that material prices and overhead charges were going up during the contract period, without any increase in the contract price, but when the contract was extended to December 31, 1973, he decided nevertheless to go on with the works. He also explained the difficulties he encountered in proceeding with the works by reason of the various obstructions referred to. He said that in the middle of April, 1973, he consulted CW2, Bobby Ho, a Consultant Engineer, who looked into the whole matter and walked the site with the witness, and as a result of the advice received from Mr. Ho and the claimant's solicitors, the claimant wrote to the P.W.D. on June 5, 1973, (AB 2-210) rescinding the contract on the basis that the P.W.D. was in fundamental breach thereof. Thereafter, the claimant stopped work, and refused to comply with a demand contained in a letter dated June 15, 1973 from the P.W.D. (AB-218) that the claimant should resume work within seven working days of the receipt of the said letter, and threatening action in default, under clause 34 of the conditions of contract.

(11) During the hearing, there was considerable discussion as to why a contract dated February 15, 1971 should give a possession date 2 weeks earlier than the contract date, and why the period of the contract should be only 2 years having regard to the many obstructions and obstacles to the works being able to proceed smoothly. A clue may be found perhaps in the evidence of RW5, Tsao Hsien Hwa, at page 88 of the Notes of Evidence. Mr. Tsao was at the relevant time an Executive Engineer, Roads Branch, P.W.D., who had seen CW1, Peter Woo, during the tender period. He said that the British AID was due to lapse 2 years from the commencement of the whole project.

(12) It has been argued on behalf of the claimant that the P.W.D. is in fundamental breach of its obligations under the contract as summarised in Hudson's Building and Engineering Contracts, 10th Edition, page 317, and authorities have been cited on both sides. The claimant relies on the well-known case of *Suisse Atlantique Societe D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale*[1] and other authorities.

(13) The P.W.D. in the course of copious amendments to its pleadings raised a large number of legal issues upon which verbal and written submissions were made. It is unnecessary to canvass the submissions on both sides at length. In my opinion, the obstructions and obstacles which the claimant faced when trying to perform his contract bring the case within the principle of the *Suisse Atlantique* case referred to above, by reason of the failure by the P.W.D. to enable the claimant to proceed with the contract works in any normal commercial and foreseeable manner which rendered the performance or attempted performance of the contract something totally different from that which the contract contemplated, and it was legally relevant and justifiable for the claimant to consider what was going to happen in the future when he was consulting Bobby Ho and his solicitors shortly before giving notice that he treated the P.W.D. as in breach. As stated above, the evidence of RW8 Robert Lim (one of the P.W.D.'s own witnesses) was to the effect that the first 11 months of the contract were in effect lost, and that in May 1973, there was little difference between the situation which had existed in January 1973 and that 50–60% of the works, as things were in May 1973, still could not be done. The evidence of CW1, Peter Woo, and CW2, Bobby Ho, shows that the claimant reasonably feared bankruptcy if he were to attempt to continue with his contract. The evidence of RW2, Kwok Chee Hong concerning the diversion of services is also indicative of a failure to plan ahead, to the claimant's detriment. I am accordingly of the opinion and so find that the claimant has made out a case of fundamental breach.

(14) It is well established that a party who is in fundamental breach cannot rely on exceptions or protecting provisions in a contract, such as Clauses 29 and 32(b) of the contract and the waiver at AB 2-204. I find that the contentions advanced on the P.W.D.'s behalf and based on wrongful abandonment by the claimant, fail, together with the pleas of waiver, affirmation and estoppel. 'Both waiver and election require some unequivocal act; estoppel requires some form of representation'. (*per* Kerr J. in *China National etc. Corp.* v. *Evlogia Shipping Co. S.A.*[2]). I cannot bnd that these requirements have been satisfied in this case. I find that the circumstances which in fact were encountered by way of obstructions to the proper progress of the works reasonably contemplated by the claimant were, or at any rate should have been, anticipated or foreseeable on the part of the P.W.D., whose knowledge of the whole circumstances was, whilst considering the duration of the contract, or should have been, far more detailed by reason of its access to information not available to tenderers e.g. as to diversion of services. I also find that there was no waiver of the fundamental breach or estoppel, or affirmation of the contract, by reason of the claimant having struggled on as long as he could in the face of all the difficulties. The cases relied on by the P.W.D. are distinguishable on the facts.

(15) It follows from my said findings that the claimant is entitled to damages and the counterclaim fails."

It is submitted that the arbitrator was wrong in basing his award on a failure by the P.W.D. to enable the claimant to proceed with the contract works in a normal commercial and foreseeable manner when there is, on the proper construction of the contract, no such duty on the P.W.D.

The argument of counsel for the respondent is this. The matter of delays are dealt with by the parties by express provisions in the contract. The arbitrator based his decision on an implied term that the claimant should be able to proceed with the contract works in a normal commercial and foreseeable manner. The arbitrator was wrong in implying such

a term in the face of the express and clear provisions of the contract in clause 29(b) and Note 5 of the Specifications. The arbitrator should only have implied a term that the P.W.D. should clear the obstruction within a reasonable time and proceed with his findings on that basis. The arbitrator was justified only in implying in the contract these terms which in fact were contained in the letters exchanged by the parties prior to the signing of the formal contract namely (1) that the P.W.D. should clear the obstruction as quickly as possible and (2) that an adequate extension to completion date should be given to the claimant. The arbitrator should have admitted the said correspondence as forming a collateral contract and held that there was such a collateral contract. Had the arbitrator acted correctly in these two respects he would not have held that the P.W.D. was in breach let alone in fundamental breach.

In my opinion the arbitrator was correct in his view that the evidence of pre-contract negotiations and statements made by or on behalf of either party and not being within the contract documents is inadmissible under section 92 of the Evidence Act to contradict, vary, add to or subtract from the terms of the contract.

In my view the arbitrator has not implied a term in the contract which is completely unwarranted. On the facts found by the arbitrator it was open to the arbitrator to find (which he did) that the P.W.D. had committed a fundamental or repudiatory breach. The P.W.D. had by their breach "produced a situation fundamentally different from anything which the parties could as reasonable men have contemplated when the contract was made", (*per* Lord Reid in *Suisse Atlantique Societe D'Armement Maritime S.A.* v. *N.V. Rotterdamsche Kolen Centrale*).

The next point taken by the respondent is that the arbitrator had misstated the law that "it is well established that a party who is in fundamental breach cannot rely on exceptions or protecting provisions in a contract."

In the *Suisse Atlantique* case Lord Reid said (at page 398):

"I do not think that there is generally much difficulty where the innocent party has elected to treat the breach (fundamental breach) as a repudiation, bring the contract to an end and sue for damages, Then the whole contract has ceased to exist including the exclusion clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term. But that is not the situation in the present case, where in my view the appellants elected that the contract should continue in force.

Where the contract has been affirmed by the innocent party at first sight the position is simple. You must either affirm the whole contract or rescind the whole contract, you cannot approbate and reprobate by affirming part of it and disaffirming the rest — that would be making a new contract. So the clause excluding liability must continue to apply. But that is too simple and there is authority for two quite different ways of holding that, inspite of affirmation of the contract as a whole by the innocent party, the guilty party may not be entitled to rely on a clause in it. One way depends on construction of the clause. The other way depends on the existence of a rule of substantive law."

Lord Hodson in the same case said (at page 410):

"Sometimes it has been declared that where a fundamental breach of contract had occurred an exception clause could not as a matter of law be relied upon, but the better view on the authorities, and that accepted by both sides before your Lordships, is that as a matter of construction normally an exception or exclusive clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of contract."

The arbitrator in my view has not misstated the law.

It is clear that clause 32(b) of the contract is an exceptions clause; it was inserted solely for the protection of the P.W.D.

The arbitrator is right in his finding that "there was no waiver of the fundamental breach or estoppel, or affirmation of the contract, by reason of the claimant having struggled on as long as he could in the face of all the difficulties."

It is submitted that, even assuming that there were serious breaches on the part of the P.W.D., the claimant was not right in walking off the site. The least that she should have done would have been to serve a notice on the respondent giving the respondent reasonable time in which to remedy whatever breaches she alleged against the respondent. Now, nowhere in the Notice of Motion was this complaint made and the respondent cannot now raise it.

The next point taken by the respondent is that the arbitrator has misconducted himself. The respondent says that the arbitrator had been requested by the respondent to state a case and the arbitrator had told the parties that he would consider that request. But before communicating his decision on the respondent's request the arbitrator published his award and thereby prevented the respondent from applying to the court to order a special case.

It is clear that the arbitrator did not rule that he would state his award as a special case under section 28. He ruled that he would state his award as a special case if it appeared desirable to him in the course of the reference. In fact on June 28, 1976, the arbitrator wrote to the respondent saying, *inter alia*, that in the exercise of his discretion he proposed to find the facts and apply the law to the facts leaving whichever party may who wish to do so to apply to the court in the usual way; that there was no agreement between the parties that the award should be in the form of a special case under section 28 and that it was his intention to give a reasoned award.

There is no substance in this complaint of the respondent.

In the result this motion fails and is dismissed with costs.

Motion dismissed.

Solicitors: *Murphy & Dunbar.*

SINGAPORE GOVERNMENT OFFICERS' CO-OPERATIVE HOUSING SOCIETY LTD. v. ACHUTHA MENON*

[A.C.J. (Choor Singh J.) October 3, 1978]
[Singapore — District Court Appeal No. 39 of 1977]

Co-operative Society — Deposit of moneys made by member — Deposit made for purchase of house and con-

* Reversed by C.A. on 15-1-79.